COURT FILE NO.: 00-CV-199551CP
DATE: 2003-03-06

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Danny A. Joanisse et al, Plaintiffs and Elliott Thompson Barker et al.,Defendants

BEFORE: Justice Cullity

COUNSEL: *Joel P. Rochon and Annelis Thorsen*, for the Plaintiffs

Mary M. Thomson, for the Defendants Elliott Thompson Barker and Gary J. Maier

Sara Blake, for the Defendant Her Majesty the Queen in Right of Ontario

HEARD: March 4, 2003

ENDORSEMENT

March 4, 2003

[1] At the conclusion of the hearing, I dismissed the motion by Drs Barker and Maier and, because of the novelty of the issue, I made no order for costs. The motion was for the production of certain medical/psychiatric records in the possession of plaintiffs' counsel, or in that of the Crown. The records would be those of a sample of 20 or so members of the putative class.

[2] I accepted Miss Blake's submission that, as no notice had been given to the members whose records might be produced, I had no jurisdiction to make an order pursuant to section 35 (9) of the *Mental Health Act*. Although Ms Thomson submitted that reliance could be placed on section 35 (11) of the statute, I do not believe that, before certification as a class proceeding, the action should be considered - for the purpose of that provision - to have been "commenced by or on behalf of" a member of the putative class who is not a representative plaintiff. If the contrary were the position, members of the putative class who had no knowledge of the proceedings and who might opt out if certification was granted would be liable to have their medical records produced against their will. Ms Thomson did not push the argument that far. She submitted, that the order of the court - presumably made by virtue of section 12 of the *Class Proceedings Act* - should be made applicable only to those members of the putative class who have contacted plaintiffs' counsel and indicated their interest in the litigation and who consent to the production of the records. The order would be addressed to plaintiffs' counsel who would have an obligation to make inquiries of the members who have contacted his firm and to communicate the response of any who are prepared to consent. In the event that consents were not forthcoming, Ms Thomson proposed to rely on that fact in opposing certification.

[3] I did not find Ms Thompson's suggested order attractive. Members of a putative class are entitled to reserve their decision to opt out of the proceedings until after certification when common issues will have been defined and a litigation plan approved - however tentatively. I believe they should be entitled to reserve, also, until that time a decision with respect to the production of their medical records. There was no suggestion that any of the members have bound themselves in any way to participate in the class if certification is granted.

[4] Moreover, the value to be attributed to the confidentiality of mental health records is sufficiently evident in the provisions of the *Mental Health Act* that the court should be very reluctant to impose pressure on individuals to consent to their disclosure. Independently of that value, I am by no means satisfied here that the purposes for which the production of a sample of records is requested will be of assistance to the moving parties, or to the court, on the motion for certification. Their relevance is, in my judgment, doubtful and, if it exists, I do not see how it could add materially and significantly to the evidence that such parties will be able to provide from their own knowledge. When the benefits to be obtained from production of the records at this stage were weighed against the interests of the putative class members in having the confidentiality of their mental health records maintained, I had no hesitation in refusing to make the order requested.

Cullity J.

DATE: March 6, 2003